

Exhibit 38

Filed Under Seal

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

NETLIST INC., a Delaware corporation,

Plaintiff,

vs.

SAMSUNG ELECTRONICS CO.,
LTD., a Korean corporation,,

Defendant.

CASE NO. 8:20-cv-00993-MCS-ADS

**DEFENDANT SAMSUNG
ELECTRONICS CO., LTD.'S
[PROPOSED] STATEMENT OF
UNCONTROVERTED FACTS
AND CONCLUSIONS OF LAW IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT OR IN
THE ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT**

*[Filed Concurrently with Notice of Motion and
Motion for Summary Judgment or in the
Alternative, Partial Summary Judgment;
Declaration of Joyce J. Choi; [Proposed]
Judgment]*

Date: September 20, 2021
Time: 9:00 a.m.
Crtrm.: 7C

Assigned to Hon. Mark C. Scarsi
Courtroom 7C

Pursuant to Local Rule 56-1 and the Initial Standing Order for Civil Cases Assigned to Judge Mark C. Scarsi, Defendant Samsung Electronics Co., Ltd. hereby submits the following Proposed Statement of Uncontroverted Facts and Conclusions of Law in Support of Defendant's Motion For Summary Judgment, or in the Alternative, Summary Adjudication.

STATEMENT OF UNCONTROVERTED FACTS

Samsung Is Entitled to Judgment on Plaintiff's First Cause of Action for Breach of Contract (Supply)

1. Section 6.2 Is Limited To the Supply And Pricing Of Components For The Joint Development Project

a. The Parties' Long Standing Business Relationship Involved \$200 Million of Purchases Over 15 Years

Defendant's Undisputed Facts	Supporting Evidence
1. Netlist has been a customer of Samsung since at least 2001, purchasing over \$200 million of products, including NAND and DRAM components.	Declaration of Joyce J. Choi filed concurrently herewith ("Choi Decl.") ¶ 2, Exh. 1 at p. SEC008161; ¶ 3, Exh. 2 at 11:21-12:12, 13:10-20, 14:8-15.
2. Both before and after the JDLA and to the present, Samsung has been a significant and continuous supplier of NAND and DRAM to Netlist, as reflected in Netlist's annual reports.	Choi Decl. ¶ 4, Exh. 3 at p.6; ¶ 5, Exh. 4 at p.8; ¶ 6, Exh. 5 at 294:4-18; ¶ 7, Exh. 6 at p.F-36; ¶ 3, Exh. 2 at 185:10-186:1, 187:21-188:5.
3. Netlist also purchased NAND and DRAM products from SK Hynix and Micron, as well as from sellers who purchased the products from the	Choi Decl. ¶ 4, Exh. 3 at p.6; ¶ 6, Exh. 5 at 194:2-22, 294:4-18; ¶ 3, Exh. 2 at 205:23-206:18, 207:21-208:10.

1	manufacturers for resale.	
2	4. The amount of NAND and DRAM	Choi Decl. ¶ 8, Exh. 7 at 121:24-122:13;
3	product that Samsung can manufacture	Dkt. 89-21 at ¶ 4.
4	for sale is limited and demand for its	
5	products oftentimes exceeds available	
6	supply.	
7	5. Due to the nature of the industry,	Choi Decl. ¶ 9, Exh. 8; ¶ 10, Exh. 9;
8	Netlist, like other customers, provides	¶ 3, Exh. 2 at 35:10-36:13, 37:9-22,
9	Samsung with forecasts of the amount of	61:25-62:5.
10	product it wishes to purchase, and	
11	Samsung lets Netlist know how much	
12	product it can allocate to Netlist for	
13	purchase.	
14	6. Following these discussions regarding	Choi Decl. ¶ 12, Exh. 11 at 23:23-24:5;
15	allocations and availability, Netlist issued	¶ 3, Exh. 2 at 62:6-14;
16	purchase orders for specific amounts of	¶ 13, Exh. 12 at 28:4-25.
17	product that Samsung approved	
18	beforehand.	
19	7. Samsung accepted and fulfilled some	Choi Decl. ¶ 12, Exh. 11 at 36:8-11;
20	of the purchase orders, put some on	Choi Decl. ¶ 3, Exh. 2 at 45:2-46:8,
21	backlog, and rejected others, just as it did	62:6-14.
22	with other customers.	
23	8. This business protocol—the use of	Choi Decl. ¶ 3, Exh. 2 at 47:24-50:6,
24	backlogs, forecasts, allocations, and	62:6-14;
25	purchases orders—remained the same	¶ 14, Exh. 13 at p.NL004680.
26	throughout the parties’ long standing	
27	business relationship and even after the	
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JDLA was executed.

b. The JDLA Involved Joint Development of a “Game Changing” Product Based On the NVDIMM-P Standard

Defendant’s Undisputed Material Facts	Supporting Evidence
9. In early 2015, Netlist approached Samsung to discuss a strategic partnership involving joint development of a product based on a new standard called NVDIMM-P and licensing of Netlist’s patents.	Choi Decl. ¶ 15, Exh. 14 at p. 13, RFA No. 18 .
10. The NVDIMM-P-related product was a “game changer” according to Chuck Hong and, based on presentation materials, was designed to take market share in a \$15 billion industry.	Choi Decl. ¶ 8, Exh. 7 at 139:7-25; ¶ 17, Exh. 16 at SEC008159.
11. At that time, Netlist also raised a licensing component and the potential that Samsung would be subject to an injunction for infringement of Netlist’s patents.	Choi Decl. ¶ 18, Exh. 17 at NL107807; ¶ 8, Exh. 7 at 42:4-14.
12. Around this time, Netlist was having cash flow issues.	Choi Decl. ¶ 19, Exh. 18 at F-7.
13. On November 12, 2015, after months of negotiations, Samsung and Netlist entered into the JDLA.	Choi Decl. ¶ 20, Exh. 19 at p. 1.

1	14. The structure and terms of the JDLA	Choi Decl. ¶ 20, Exh. 19 at p. 1.
2	reflect that the parties intend “to work	
3	together to jointly develop an interface	
4	and associated technologies for certain	
5	memory modules and promote such	
6	interface to standards-setting	
7	organizations.”	
8	15. The "Developed Product" in the	Choi Decl. ¶ 20, Exh. 19 at p. 2.
9	JDLA means an NVDIMM-P Product	
10	developed by the Parties hereunder	
11	pursuant the Statement of Work that	
12	meets the Product Specifications.	
13	16. The JDLA also includes a grant of	Choi Decl. ¶ 20, Exh. 19 at p. 7, § 7.
14	cross-licenses and a release of threatened	
15	claims.	
16	17. The JDLA states that Netlist was to	Choi Decl. ¶ 20, Exh. 19 at p. 5, § 3.1; ¶
17	receive \$8 million for non-recurring	21, Exh. 20 at p. 2; ¶ 22, Exh. 21 at
18	engineering on the NVDIMM-P	NL069669, § II.7.
19	development work, and concurrently	
20	with the JDLA, provide an additional \$15	
21	million convertible loan at 2% interest	
22	that allowed Netlist to pay off existing	
23	debt with less favorable financial terms.	
24	18. In addition to its receipt of cash and	Choi Decl. ¶ 8, Exh. 7 at 31:9-12, 33:12-
25	financing from Samsung, Netlist stood to	34:6, 79:6-80:23, 139:7-25.
26	benefit from the relationship, especially if	
27	the parties were able to develop this	
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1	“game changing” standard for	
2	NVDIMM-P and produce a	
3	commercially feasible product under this	
4	standard.	
5	19. The terms of the JDLA seek to	Choi Decl. ¶ 20, Exh. 19 at pp. 4-8.
6	implement these objectives, including	
7	terms for the collaborative development	
8	work in accordance with product	
9	specification and development milestones	
10	and a Statement of Work (Section 2,	
11	Appendices A and B); development costs	
12	(Section 3); IPR ownership (Section 4);	
13	schedule for standardization and	
14	productization (Section 5); supply	
15	(Section 6); a mutual release of claims	
16	(Section 7); and licensing of intellectual	
17	property (Section 8).	

c. Section 6.2 Is Limited To Joint Development Work Under The JDLA

Defendant’s Undisputed Material Facts	Supporting Evidence
20. Pursuant to the JDLA, Samsung and Netlist agreed to supply components to each other for the NVDIMM-P product which they had agreed to jointly develop and therefore did not yet exist. Specifically, Section 6.1 states: “Supply by	Choi Decl. ¶ 20, Exh. 19 at p. 6, §§ 6.1, 6.2.

1	Netlist. Netlist will provide Samsung any	
2	NVDIMM-P controller on Samsung's	
3	request at a price lower than the price	
4	Netlist provides to any other buyer."	
5	Section 6.2, the parallel provision, states:	
6	"Supply by Samsung. Samsung will	
7	supply NAND and DRAM products to	
8	Netlist on Netlist's request at a	
9	competitive price (i.e., among customers	
10	purchasing similar volumes of similar	
11	products)."	
12	21. Samsung's supply obligations would	Choi Decl. ¶ 8, Exh. 7 at 31:9-12, 80:13-
13	only arise if and to the extent that the	23, 92:4-12, 109:9-110:1, 116:3-9; ¶ 22,
14	NVDIMM-P product was	Exh. 21 at NL069668-69.
15	commercialized but this never occurred.	

d. The Negotiating History Shows That Section 6.2 Is Limited To Joint Development

Defendant's Undisputed Material Facts	Supporting Evidence
22. Netlist's first proposal to Samsung in April 2015 focused on the cash consideration, and did not mention a long term supply agreement. ("Q Now, at least on this proposal, Netlist didn't list supply as a component of the deal; correct? A Yes, it's not here.")	Choi Decl. ¶ 18, Exh. 17 at pp. 2-4; ¶ 18, Exh. 17 at NL107807; ¶ 8, Exh. 7 at 51:3-52:18.
23. When Netlist sent Samsung the first	Choi Decl. ¶ 23, Exh. 22; ¶ 24, Exh. 23

1	draft of the term sheet on April 21, 2015,	at § II.
2	Netlist proposed, as part of the “Joint	
3	development and marketing” for the	
4	“Technology Collaboration,” that	
5	Samsung supply NAND and DRAM	
6	product.	
7	24. In Netlist’s June 9, 2015 revision to	Choi Decl. ¶ 25, Exh. 24, § II.5.
8	the term sheet, under the heading	
9	“Technology Collaboration,” Netlist	
10	proposed: “Raw Materials: Samsung will	
11	supply NAND, DRAM on mutually	
12	agreed terms.”	
13	25. Netlist CEO Chuck Hong testified	Choi Decl. ¶ 8, Exh. 7 at 91:4-17.
14	that “Technology Collaboration” in	
15	Netlist’s revised term sheet referred to	
16	the parties’ joint efforts to standardize	
17	NVDIMM-P.	
18	26. Netlist CEO Chuck Hong testified	Choi Decl. ¶ 8, Exh. 7 at 92:4-12.
19	that the “Raw Materials” in Netlist’s	
20	revised term sheet referred to various	
21	DRAM and NAND flash components	
22	necessary for the parties’ joint efforts to	
23	standardize NVDIMM-P.	
24	27. In Netlist’s June 25, 2015 updated	Choi Decl. ¶ 26, Exh. 25 at NL005090,
25	term sheet, under the heading “Phase 2:	NL005092.
26	Technology Productization,” Netlist	
27	proposed: “1. Parties will work together	
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1	to bring an NVDIMM-P product to	
2	market. Details of the technical	
3	collaboration to be negotiated at a later	
4	date” and “Raw Materials: Samsung will	
5	supply NAND and DRAM on mutually	
6	agreed terms.”	
7	28. CEO Chuck Hong testified that the	Choi Decl. ¶ 8, Exh. 7 at 101:25-102:7.
8	“Raw Materials” in Netlist’s updated	
9	term sheet referred to various DRAM	
10	and NAND flash components necessary	
11	for commercialization of the NVDIMM-	
12	P product which the parties were	
13	developing.	
14	29. In the drafts leading up to the final	Choi Decl. ¶ 8, Exh. 7 at 104:6-24.
15	and executed MOU, Netlist understood	
16	that Samsung’s supply obligations would	
17	only arise in the event of	
18	commercialization of the NVDIMM-P	
19	product subject to the parties’ joint	
20	development but this never occurred.	
21	30. Netlist CEO Chuck Hong testified	Choi Decl. ¶ 8, Exh. 7 at 109:9-110:1.
22	that Netlist’s intent underlying the MOU	
23	was to get Samsung’s commitment to	
24	supply NAND and DRAM products for	
25	the NVDIMM-P product so that Netlist	
26	would have sufficient supply if and when	
27	it was able to commercialize the	
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1	technology.	
2	31. According to Chuck Hong,	Choi Decl. ¶ 8, Exh. 7 at 79:13-80:23,
3	NVDIMM-P was “industry changing”	139:7-141:6.
4	technology and Netlist’s attempt to	
5	standardize a NVDIMM-P product was a	
6	significant business opportunity and one	
7	that Netlist had invested more than \$10	
8	million in engineering costs into.	
9	32. The MOU reflected both parties’	Choi Decl. ¶ 8, Exh. 7 at 31:9-12, 80:13-
10	intent on the important points of the	23, 92:4-12, 109:9-110:1, 116:3-9; ¶ 22,
11	parties’ agreement.	Exh. 21 at NL069668-69.
12	Section 6 of the MOU states in full	
13	(emphasis added):	
14	6. Most Favored Nation	
15	(MFN): Netlist will provide	
16	Samsung any NVDIMM-P*	
17	controller at a price lower	
18	than the price Netlist	
19	provides to any other buyer.	
20	Either party may produce	
21	NVDIMM-P controller	
22	using its own technology	
23	and has no obligation to	
24	buy from the other party.	
25	<i>Raw Materials: Samsung will</i>	
26	<i>provide competitive pricing (i.e.</i>	
27	<i>among customers purchasing the</i>	

1	<i>same products and similar</i>	
2	<i>volumes) for the supply of</i>	
3	<i>Samsung NAND and DRAM</i>	
4	<i>products.</i>	
5	As to the MOU, Chuck Hong again	
6	testified in deposition that section 6.2	
7	limited Samsung's supply obligation to	
8	the NVDIMM-P development and that	
9	this obligation would arise only if and to	
10	the extent that the NVDIMM-P product	
11	was ever commercialized.	
12	33. On October 8, 2015, when the parties	Choi Decl. ¶ 27, Exh. 26 at p. 1; ¶ 28,
13	began drafting the JDLA from the MOU,	Exh. 27 at p. 5, § 6.2.
14	Samsung proposed the following	
15	language to Netlist:	
16	"6.2 Supply by Samsung. Samsung will	
17	supply NAND and DRAM to Netlist on	
18	Netlist's request at a competitive price	
19	similar to the customers purchasing	
20	similar volumes of similar products. For	
21	the avoidance of doubt, any of the	
22	provisions under this Agreement will not	
23	be deemed to require Netlist to purchase	
24	any products from Samsung or to require	
25	Samsung to supply any products to	
26	Netlist."	
27	34. Whitley was Netlist's main	Choi Decl. ¶ 8, Exh. 7 at 130:6-24.
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1	contributor to the JDLA.	
2	35. On October 14, 2015, as to the new	Choi Decl. ¶ 29, Exh. 28 at p. 2; ¶ 30,
3	Section 6.2 of its proposed JDLA,	Exh. 29 at p. 1; ¶ 31, Exh. 30 at p. 5;
4	Whitley wrote in bold “Conflicts with	¶ 32, Exh. 31 at NL118147 and
5	MOU” and “Samsung states that nothing	NL118149.
6	in this agreement will ‘require Samsung	
7	to supply any products to Netlist.’ Netlist	
8	removed this qualification and returned	
9	the language to reflect what was agreed	
10	to in the MOU.” Samsung agreed to this	
11	change.	
12	36. As expressed by Whitley, it was	Choi Decl. ¶ 29, Exh. 28 at p. 2.;
13	Netlist’s position that the MOU should	¶ 8, Exh. 7 at 130:6-132:10.
14	govern the supply term. As set forth in	
15	SUF nos. 20 and 31, the MOU only	
16	required that Samsung supply product in	
17	the event that the NVDIMM-P product	
18	was ever commercialized.	
19	37. Netlist wanted Samsung’s assurance	Choi Decl. ¶ 8, Exh. 7 at 80:13-23.
20	that it would supply NAND and DRAM	
21	to support NVDIMM-P sales if the joint	
22	development proved successful, and	
23	demand for the product took off.	
24	38. During the contract negotiations,	Choi Decl. ¶ 33, Exh. 32 at p. 1.
25	Netlist’s CFO Gail Sasaki wrote to	
26	Samsung: “Both sides understood from	
27	the outset that this was a strategic deal,	
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not a financial one. *The value that would be transferred and created resided in the patents and the technology.*”

e. **Netlist Admits JDLA Is Not A Contract to Supply DRAM and NAND Beyond Joint Development**

Defendant’s Undisputed Material Facts	Supporting Evidence
39. In his declaration to this Court, Netlist CEO Chuck Hong indicated that the purported supply arrangement that Netlist is litigating was “crucial” and “critical.”	Dkt. 89-21 at ¶¶ 4, 5.
40. Netlist disclosed an agreement with SK Hynix on April 5, 2021, stating that contract “entitles Netlist to purchase up to \$600,000,000 of SK Hynix memory products during the term . . .”	Choi Decl. ¶ 34, Exh. 33 at p. 2.
41. Netlist CEO Chuck Hong’s presentation to the Board in November 2015, prepared by Netlist CFO Gail Sasaki, describes the technology collaboration and the cross-licensing of patents but makes no mention of Netlist’s supposed broad supply agreement.	Choi Decl. ¶ 35, Exh. 34 at p. 1; 36, Exh. 35 at p. 1.
42. In its first annual report following the	Choi Decl. ¶ 19, Exh. 18 at p. 13.

1	JDLA, Netlist disclosed the risks	
2	associated with not having a supply	
3	contract:	
4	“Our ability to fulfill customer orders or	
5	produce qualification samples is	
6	dependent on a sufficient supply of field	
7	programmable gate arrays (“FPGAs”),	
8	DRAM ICs and NAND flash, which are	
9	essential components of our memory	
10	subsystems. There are a relatively small	
11	number of suppliers of FPGAs, DRAM	
12	ICs and NAND flash, and we purchase	
13	from only a subset of these suppliers. <i>We</i>	
14	<i>have no long-term FPGA, DRAM or</i>	
15	<i>NAND flash supply contracts.”</i> (emphasis	
16	added)	
17	43. Netlist repeatedly and consistently	Choi Decl. ¶ 74, Exh. 73 at p. 18; ¶ 75,
18	disclosed the risks associated with not	Exh. 74 at p. 22; ¶ 4, Exh. 3 at p. 14; ¶
19	having a long-term supply contract for	37, Exh. 36 at p. 14; ¶ 19, Exh. 18 at p.
20	DRAM and NAND in its annual reports	13; ¶ 38, Exh. 37 at p. 19; ¶ 7, Exh. 6 at
21	before and after execution of the JDLA,	p. 20; ¶ 5, Exh. 4 at p. 22; ¶ 39, Exh. 38
22	each time stating that Netlist had “no	at p. 20; ¶ 40, Exh. 39 at p. 15.
23	long-term supply contracts” for these	
24	products.	
25	44. A November 2, 2015 press release	Choi Decl. ¶ 41, Exh. 40 at pp. 2-5.
26	announcing the JDLA that Netlist was	
27	preparing had a headline stating “Netlist	
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1 and Samsung Announce Strategic	
2 Alliance To Commercialize the First	
3 Unified Memory-Storage Architecture”	
4 and makes no mention of a supply	
5 agreement.	
6 45. At a February 21, 2017 meeting,	Choi Decl. ¶ 17, Exh. 16 at SEC008148,
7 Netlist asked Samsung for a “New	SEC008169; ¶ 42, Exh. 41 at p. 3; ¶ 43,
8 Partner Type” relationship that would	Exh. 42 at 43:22-45:3.
9 require Samsung to provide “Product	
10 Allocation support for Netlist” and an	
11 “Official-Distributor Partnership	
12 Agreement.” When Netlist made this	
13 ask, Samsung told Netlist that the JDLA	
14 was not an avenue to support Netlist’s	
15 standard products.	

f. The Parties’ Course of Conduct Shows That Samsung Had No Obligation To Supply All Chips At Request

19 Defendant’s Undisputed Material	Supporting Evidence
20 Facts	
21 46. Netlist received all of the chips it	Choi Decl. ¶ 8, Exh. 7 at 88:10-89:5.
22 needed to complete the initial phase of	
23 the NVDIMM-P product under the	
24 JDLA.	
25 47. The NVDIMM-P product was never	Choi Decl. ¶ 8, Exh. 7 at 109:21-110:1.
26 commercialized.	
27 48. Samsung’s performance was	Choi Decl. ¶ 3, Exh. 2 at 52:21-53:10;

1	satisfactory in 2015, 2016 and into 2017.	¶ 44, Exh. 43 at ¶ 4; ¶ 45, Exh. 44 at ¶ 7.
2	49. In 2015, 2016 and into 2017,	Choi Decl. ¶ 3, Exh. 2 at 54:24-55:10; ¶
3	Samsung did not fulfill all of Netlist's	44, Exh. 43; ¶ 46, Exh. 45; ¶ 47, Exh.
4	requested orders.	46; ¶ 48, Exh. 47; ¶ 49, Exh. 48; ¶ 50,
5		Exh. 49
6		¶ 8, Exh. 7 at 122:20-123:5, 152:15-24; ¶
7		51, Exh. 50; ¶ 55, Exh. 51
8	50. For all orders both before and after	Choi Decl. ¶ 3, Exh. 2 at 29:7-24, 47:24-
9	the JDLA, Netlist has always used	48:18; ¶ 13, Exh. 12 at 151:5-19;
10	purchase orders.	
11	51. Netlist's purchase orders indicate as	Choi Decl. ¶ 53, Exh. 52 at NL002028-
12	follows:	29; ¶ 13, Exh. 12 at 151:5-19; ¶ 3, Exh. 2
13	1. Acceptance	at 29:7-24, 47:24-48:18.
14	The terms and conditions hereof become	
15	the exclusive and binding agreement	
16	between the parties covering the	
17	purchase of goods or services ordered	
18	herein when this purchase order is	
19	accepted by acknowledgment or	
20	commencement of performance. This	
21	order may be accepted only on these	
22	terms and conditions.	
23	[...]	
24	12. Entire Agreement	
25	This agreement sets forth the entire	
26	agreement between parties with respect	
27	to the subject matter hereof and	
28	supersedes all prior agreements and	
	discussion between them. No	
	modification or amendment here will be	
	effective unless in writing and signed by a	
	daily authorized representative of each	
	party. Any terms and conditions set forth	
	in any order confirmation or	
	acknowledgement or any other	
	documents shall be of no force or effect	
	whatsoever.	

1	All of Netlist's purchase orders contain	
2	the same terms and conditions for all its	
3	purchases from Samsung.	
4	52. After the JDLA, Samsung continued	Choi Decl. ¶ 3, Exh. 2 at 47:24-50:6,
5	to supply Netlist with NAND and	54:24-55:10, 183:3-15, 184:8-20.
6	DRAM outside of the joint development	
7	context.	
8	53. Samsung's sales to Netlist have	Choi Decl. ¶ 21, Exh. 11 at 25:6-25,
9	continued from 2001 to the present day,	201:9-18; ¶ 3, Exh. 2 at 27:21-28:12,
10	according to the same course of dealing	35:23-36:13, 37:18-22, 47:24-50:4,
11	that existed before the JDLA, after the	183:3-15, 184:8-20.
12	JDLA, and continue to this day after	
13	Netlist purported to terminate the JDLA	
14	and filed this lawsuit.	
15	54. Netlist understood that the JDLA did	Choi Decl. ¶ 3, Exh. 2 at 47:24-50:6,
16	not guarantee it access to all of the	54:24-55:10, 91:10-93:24, 94:6-21, 183:3-
17	Samsung product it requested, but only	15, 184:8-20;
18	the product that Samsung actually agreed	¶ 53, Exh. 52 at NL002024-2027;
19	to sell.	¶ 54, Exh. 53 at pp. 1, 2;
20		¶ 46, Exh. 45;
21		¶ 49, Exh. 48.
22	55. Due to Samsung needing led time for	Choi Decl. ¶ 3, Exh. 2 at 48:10-12.; Choi
23	production, Netlist submitted forecasts	Decl. ¶ 13, Exh. 12 at 152:5-153:24;
24	of its requests, and discussed with	
25	Samsung how much material would be	
26	allocated and made available to it.	
27	56. Netlist only submitted purchase	Choi Decl. ¶ 12, Exh. 11 at 23:23-24:5;
28		

1	orders for specific quantities of product	¶ 3, Exh. 2 at 62:6-14, 93:18-24.;
2	after Samsung indicated that such	Choi Decl. ¶ 13, Exh. 12 at 154:3-20
3	product would be available.	
4	57. According to their own terms,	Choi Decl. ¶ 55, Exh. 54 at pp. 3, 6, 9, §
5	Netlist's purchase orders superseded any	28; ¶ 53, Exh. 52 at NL002029.
6	prior agreements or discussions with	
7	Samsung, such as forecasts and informal	
8	e-mail or oral requests to purchase	
9	product.	
10	58. Netlist purchased a substantial	Choi Decl. ¶ 51, Exh. 50 at F-36, F-34,
11	amount of NAND and DRAM from	F-36, F-36, F-36, 77; ¶ 52, Exh. 51; Choi
12	Samsung in each quarter from November	Decl. ¶ 3, Exh. 2 at 186:16-188:5; ¶ 7,
13	2015 to the present, although the	Exh. 6 at p.8.
14	amounts varied over time.	
15	59. Samsung supplied to Netlist despite	Choi Decl. ¶ 13, Exh. 12 at 40:17-42:6; ¶
16	repeated credit issues and cancelled	56, Exh. 55 at NL008985; ¶ 57, Exh. 56
17	orders by Netlist.	at NL041573; Choi Decl. ¶ 3, Exh. 2 at
18		142:15-25; ¶ 56, Exh. 55 at NL008985;
19		<i>see also</i> SUF Nos. 62-64, <i>infra</i> .

g. Netlist Did Not Fully Perform Its Obligations

Defendant's Undisputed Material Facts	Supporting Evidence
60. Netlist abandoned the NVDIMM-P standardization project and moved to a different product and never obtained a written amendment to the JDLA	Choi Decl. ¶ 58, Exh. 57 at 45:4-49:3.; Choi Decl. ¶ 8, Exh. 7 at 198:21-199:13.

1	allowing this alteration.	
2	61. In 2017, Netlist asked Samsung for	Choi Decl. ¶ 3, Exh. 2 at 195:10-12.
3	Embedded MultiMediaCard (eMMC)	
4	supply.	
5	62. Samsung does not normally sell	Choi Decl. ¶ 11, Exh. 10 at 63:17-64:16,
6	eMMC to channel distributors like	85:17-87:2
7	Netlist, but, after CEO Chuck Hong	
8	asked President Jun for support,	
9	Samsung agreed to support Netlist's	
10	requests.	
11	63. Samsung allocated a significant	Choi Decl. ¶ 11, Exh. 10 at 85:17-87:2
12	amount of EMMC product to Netlist for	
13	2017, much of which been allocated to	
14	another customer.	
15	64. After purchases orders had been	Choi Decl. ¶ 3, Exh. 2 at 194:8-196:10;
16	submitted and prices for eMMC dropped	¶ 59, Exh. 58 at NL000091. Choi Decl.
17	unexpectedly in the second half of 2017,	¶ 11, Exh. 10 at 85:17-87:2; Choi Decl. ¶
18	Netlist cancelled half of its eMMC order.	8, Exh. 7 at 164:11-21
19	Netlist CEO Chuck Hong testified that	
20	cancelling a purchase order constitutes	
21	non-performance under the JDLA.	

h. Netlist Should Be Estopped From Arguing That Its
 Patent Licenses Provide Consideration For A Broader
 Supply Obligation

Defendant's Undisputed Material Facts	Supporting Evidence
65. Netlist argued in its Korean tax	Choi Decl. ¶ 60, Exh. 59 at p. 4.

1 2 3 4 5 6 7 8 9	appeal that: “the granting of cross licenses under the [JDLA] is limited to the joint research and development, and hence in cases where Samsung Electronics uses intellectual property rights of [Netlist] in the course of its own research and development, it does not constitute something that can be subject to the [JDLA]	
10 11 12	66. The Korean tax tribunal relied on Netlist’s position that the license was limited in making its ruling.	Dkt. 88-7 at p. 7.

**Samsung Is Entitled to Judgment on Plaintiff’s Second Cause of Action for
Breach of Contract (Tax Withholding)**

Defendant’s Undisputed Material Facts	Supporting Evidence
67. Uncontroverted Fact Nos. 1-66 are incorporated herein.	
68. Section 3.2 of the JDLA states, in pertinent part: “Taxes. . . . To the extent that any withholding taxes are required by applicable law for the payment set forth in this Agreement, Samsung may deduct any applicable withholding taxes due or payable under the laws of Korea . . . provided that Samsung shall pay such	Choi Decl. ¶ 20, Exh. 19 at p. 5, § 3.2.

1	withholding taxes to the Korean tax	
2	authorities and promptly provide Netlist	
3	with a certificate of payment for such	
4	withholding tax, as required by applicable	
5	law or treaty, and reasonably cooperate	
6	with Netlist in any lawful efforts to claim	
7	a credit or refund or exemption with	
8	respect to any such withholding taxes.	
9	69. On November 5, 2015, shortly before	Choi Decl. ¶ 61, Exh. 60; ¶ 6, Exh. 5 at
10	the JDLA was signed, Samsung sent	140:23-141:22, 143:14-24. ¶ 15, Exh. 14
11	Netlist a tax form for Netlist to apply for	at RFA No. 17; ¶ 61, Exh. 60 at
12	a reduced tax rate as a foreign	NL046086-89.
13	corporation.	
14	70. The form indicated that the tax rate	Choi Decl. ¶ 61, Exh. 60 at p. 3;
15	on royalties pursuant to a treaty with the	¶ 15, Exh. 14 at RFA No. 17; ¶ 61,
16	US was 16.5%.	Exh. 60 at NL046086-89.
17	71. Netlist CFO Gail Sasaki reviewed the	Choi Decl. ¶ 61, Exh. 60 at pp. 1, 3; ¶ 6,
18	form, signed, and returned it to Samsung.	Exh. 5 at 144:1-145:4.
19	72. According to Netlist's CEO Chuck	Choi Decl. ¶ 8, Exh. 7 at 175:9-176:14.
20	Hong, Sasaki had the authority to	
21	approve and sign such tax form without	
22	his approval. In her capacity as Netlist's	
23	CEO, was expected to consult with a tax	
24	expert before executing the form to	
25	ensure it was appropriate for Netlist to	
26	sign.	
27	73. After the JDLA was signed, Samsung	Dkt. 18-2 at ¶ 16; Dkt. 88-7 at p. 4; Choi
28		

1	made the contractually required cash	Decl. ¶ 62, Exh. 61 at NL118221.
2	payment to Netlist of \$8 million, less	
3	16.5% deducted for withholding taxes,	
4	and paid that amount to the tax authority.	
5	74. Samsung did so because it considered	Choi Decl. ¶ 63, Exh. 62 at p. 1; ¶ 61,
6	the \$8 million as consideration for	Exh. 60 at p. 3; Dkt. 88-7 at p. 4.
7	Netlist's grant of patent licenses, and	
8	Korean law requires withholding of	
9	payments on such royalties.	
10	75. Samsung had numerous	Choi Decl. ¶ 64, Exh. 63; ¶ 65, Exh. 64;
11	communications with Netlist and PWC,	¶ 66, Exh. 65 at p. 1.
12	Netlist's tax consultant, shared drafts of	¶ 64, Exh. 63 at NL118533-34;
13	what Samsung proposed to submit to the	¶ 66, Exh. 65 at NL118544-48;
14	tax authorities, and even asked Netlist	¶ 67, Exh. 66 at NL118556-57.
15	and PWC to propose language that it	
16	wanted Samsung to use.	
17	76. PWC even thanked Samsung for its	Choi Decl. ¶ 65, Exh. 64 at p. 1;
18	cooperation, showing that cooperation is	¶ 65, Exh. 64 at NL118535.
19	not what Netlist complains of here.	
20	77. What Netlist wanted was for	Choi Decl. ¶ 63, Exh. 62 at p. 1; Choi
21	Samsung to deny that the \$8 million was	Decl. ¶ 61, Exh. 60 at p. 3; Dkt. 88-7 at
22	for patent royalties, which Samsung did	p. 4; ¶ 67, Exh. 66 at NL118556; ¶ 6,
23	not believe to be true.	Exh. 5 at 123:19- 124:24
24	78. Netlist won its tax appeal, and	Dkt. 88-7 at p. 3; Choi Decl. ¶ 68, Exh.
25	received a full refund plus interest.	67 at p. 2;
26		¶ 6, Exh. 5 at 136:13-137:6
27		
28		

Netlist Is Barred From Recovering Consequential Damages

Defendant's Undisputed Material Facts	Supporting Evidence
79. Uncontroverted Fact Nos. 1-78 are incorporated herein.	
80. Netlist seeks damages including lost revenues and lost profits from allegedly lost business opportunities with third party customers.	Dkt. 18-2 at ¶ 14; Choi Decl. ¶ 69, Exh. 68 at 5:23-26.
81. Section 12.5 of the JDLA states: "IN NO EVENT SHALL (A) EITHER PARTY BE LIABLE FOR ANY SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES IN CONNECTION WITH OR ARISING OUT OF THIS AGREEMENT, EVEN IF THE OTHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, WHERE EXCLUDED DAMAGES INCLUDE, BUT ARE NOT LIMITED TO, LOSS OF PROFITS, LOSS OF SAVINGS, LOSS OF USE OR PUNITIVE DAMAGES."	Choi Decl. ¶ 20, Exh. 19 at p. 11.

Samsung Is Entitled to Judgment on Plaintiff's Third Cause of Action for Declaratory Relief: Termination of Contract

Defendant's Undisputed Material	Supporting Evidence
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Facts	
82. Uncontroverted Fact Nos. 1-81 are incorporated herein.	

Netlist Waived Any Right To Terminate The JDLA

Defendant's Undisputed Material Facts	Supporting Evidence
83. Uncontroverted Fact Nos. 1-82 are incorporated herein.	
84. Netlist executives internally discussed whether to provide notice of breach over the tax withholding dispute in March 4, 2016, but decided not to send a breach notice because it wanted to reap the benefits of its business relationship with Samsung.	Choi Decl. ¶ 70, Exh. 69 at p. 1; ¶ 6, Exh. 5 at 57:4-64:2.
85. As to the supply claim, Netlist asserts that “starting as early as the second quarter of 2017, Samsung began to refuse and/or cancel orders from Netlist.	Choi Decl. ¶ 71, Exh. 70 at p. 13, ROG No. 8.
86. Instead, Netlist waited to provide notice of alleged breach until May 27, 2020, more than <i>four years</i> after it first considered doing so.	Dkt. 18-2 at ¶ 19; Choi Decl. ¶ 72, Exh. 71.
87. The \$15 million note is due December 31, 2021.	Choi Decl. ¶ 73, Exh. 72 at p. 1 § 2.

[PROPOSED] CONCLUSIONS OF LAW

1
2 1. Section 6.2 of the JDLA lacks a definite or ascertainable quantity terms
3 necessary to create an enforceable obligation to supply. *Mar-Jon Mach. & Tool Co. v.*
4 *Eastman Kodak Co.*, 534 N.Y.S.2d 47, 48 (1988)

5 2. The JDLA is not a requirements contract; it lacks a promise by Netlist to
6 buy all of its requirements, or any minimum amount or percentage of its requirements,
7 exclusively from Samsung. *Embedded Moments, Inc. v. Int'l Silver Co.*, 648 F. Supp. 187,
8 192 n. 3 (E.D.N.Y. 1986).

9 3. The JDLA is not a valid options contract because it lacks a definite or
10 ascertainable quantity term. *Express Indus. & Terminal Corp. v. New York State Dep't of*
11 *Transp.*, 93 N.Y.2d 584, 590-91 (1999).

12 4. Netlist is estopped from asserting a contrary position about its patent
13 licenses in this case that is inconsistent with the position it asserted in the Korean tax
14 tribunal. Under the equitable doctrine of judicial estoppel, a litigant is barred from
15 obtaining an advantage by asserting a position in a case, and then later seeking to obtain
16 an advantage by taking a clearly inconsistent position. *Rissetto v. Plumbers & Steamfitters*
17 *Local 343*, 94 F.3d 597, 600–01 (9th Cir. 1996).

18 5. The doctrine of judicial estoppel applies to statements made in separate
19 proceedings where the prior proceeding was an administrative proceeding. *Rissetto*, 94
20 F.3d at 604, 605. The doctrine applies to foreign proceedings as well as domestic. *GT*
21 *Beverage Co. LLC v. Coca Cola Co.*, No. SACV1000209JVSРНBX, 2010 WL 11595832, at
22 *5 (C.D. Cal. Aug. 2, 2010).

23 6. Section 3.2 of the JDLA permits Samsung to deduct withholding taxes to
24 the extent required by Korean law, even if such amounts are ultimately found not to be
25 taxable.

26 7. Section 3.2 requires Samsung to cooperate with Netlist's efforts to obtain
27 a refund; it does not require Samsung to submit responses to the tax authorities
28 inconsistent with what it believes to be accurate.

1 8. Netlist is precluded from recovering lost profits, lost revenues from lost
2 business opportunities, or any other consequential damages by Section 12.5 of the
3 JDLA. Express waivers of consequential damages are enforceable under New York
4 law. *International Gateway Exchange, LLC v. Western Union Financial Services, Inc.*, 333 F.
5 Supp. 2d 131, 149 (S.D.N.Y. 2004).

6 9. To avoid the waiver of consequential damages, Netlist would have to
7 provide evidence of “truly culpable, harmful conduct, not merely intentional
8 nonperformance of the Agreement motivated by financial self-interest.” *Metro. Life Ins.*
9 *Co. v. Noble Lowndes Int’l, Inc.*, 84 N.Y.2d 430, 438–39 (1994). No such evidence is
10 presented here.

11 10. Netlist may not terminate the JDLA because it cannot prove a material
12 breach.

13 11. Netlist waived any right to terminate the JDLA by waiting more than four
14 years after the alleged breach to provide notice of termination. *Dun & Bradstreet Corp. v.*
15 *Harpercollins Publishers, Inc.*, 872 F. Supp. 103, 110 (S.D.N.Y. 1995).

16 12. Netlist waived the “no waiver” provision in Section of the JDLA by
17 continuing to accept the benefits of the contract for years without seeking termination.
18 *TSS–Seedman's, Inc. v. Elota Realty Co.*, 72 N.Y.2d 1024, 1027 (1988).

19
20 DATED: August 17, 2021 Bird, Marella, Boxer, Wolpert, Nessim,
21 Drooks, Lincenberg & Rhow, P.C.

22
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